In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1090

JOSEPH SHERMAN, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the panel of the court of appeals (Pet. App. 11–24) and the *per curiam* opinion of the court of appeals sitting *en banc* (Pet. App. 24–25) are reported at 350 F. 2d 894.

JURISDICTION

The judgment of the court of appeals was entered on January 17, 1966. The petition for a writ of certiorari was filed on March 3, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a deportation proceeding against a resident alien, the government has sustained its bur-

212-425—66

den of proof where the findings of fact of the Special Inquiry Officer are supported by reasonable, substantial, and probative evidence.

STATEMENT

Petitioner is a sixty-year-old alien, a native of Poland, who entered the United States for permanent residence in 1920 (Tr. 2; T6, pp. 1–3).[1] In March 1963, petitioner was ordered to show cause why he should not be deported on the ground that he had last entered the United States on December 20, 1938, without inspection as an alien as required by Section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2) (T5).

In a hearing before a Special Inquiry Officer, the evidence showed that petitioner was in the United States on June 10, 1937, at which time he applied for and received a United States passport under the name of Samuel Levine (Tr. 11–26; T9; T10).[2] A man using the name of Samuel Levine used this passport to travel aboard the SS Aquitania from New York to France, arriving in France on June 22, 1937 (T17). The passport was presented for inspection by French officials on arrival in France (T10) and was subse-

[1] References preceded by "Tr." are to the pages of the hearing transcript, which is tab 4 of the administrative record. References preceded by "T" are to the numbered tabs of the administrative record. T1 is the opinion of the Board of Immigration Appeals. T3 is the opinion of the Special Inquiry Officer.

[2] The application for a passport contained a picture of petitioner and a description to fit him detailed to the point of showing a scar on the back of the right hand (Tr. 17, 25–26, 29–30; T9). The passport also contained a picture of petitioner and the same description (T10).

quently endorsed by American consulate officers in Barcelona, Spain, in early December 1938 (T19). "Samuel Levine" returned to the United States aboard the SS Ausonia, on a voyage originating at Le Havre on December 10, 1938 (T20) and terminating at New York on December 20, 1938 (T13). His destination upon entry was 403 Chester Street, Brooklyn, New York (T13), the address of petitioner's parents (T6, Exh. E).

Edward Morrow, an American citizen who went to Spain in 1937 to fight in the Spanish Civil War for the Loyalists, identified petitioner as the person who traveled under the passport bearing the name of Samuel Levine (Tr. 36, 44, 48–51, 53–62, 83–89). Morrow testified that he recognized petitioner as the person he had known as Sam Levine, who had been in Spain in 1937 and 1938 and had participated with him in the Spanish Civil War (Tr. 37, 53–62, 91, 97–101). Morrow admitted there was a possibility that he was mistaken in his identification, but said that he did not believe he was (Tr. 99–100). Morrow also recognized petitioner as being on the SS Ausonia for the voyage reaching New York from France about December 20, 1938 (Tr. 38, 52).[3]

The government's evidence was uncontroverted, petitioner having elected not to introduce any evidence. Petitioner relied primarily on cross-examination of Morrow to cast doubt on his identification of petitioner as the "Sam Levine" he had seen in 1937 and 1938.

[3] The ship manifest shows that both "Sam Levine" and Morrow were on that voyage (Tr. 39–40; T20).

The Special Inquiry Officer, noting that the burden of establishing deportability by reasonable, substantial and probative evidence was on the government (T3, p. 2), found that the government had established with a "solidarity far greater than required" that petitioner had applied for and received the United States passport introduced into evidence and had used it to enter the United States on December 20, 1938, as an American citizen named Samuel Levine (T3, p. 6). Because he was not examined as an alien upon entry as required, petitioner was ordered deported (T3, p. 8).

The Board of Immigration Appeals agreed with the Special Inquiry Officer's findings of fact, holding that the government had borne its "burden of establishing that respondent is deportable as charged" (T1, pp. 2–5).[1]

On petition for review of the order of deportation, a panel of the court of appeals, Judge Friendly dissenting, set aside the deportation order and remanded the case for further proceedings, holding that "the Government must prove beyond a reasonable doubt the facts upon which deportation depends," in cases involving long-time resident aliens. Pet. App. 20; 350 F. 2d at 899. On petition for rehearing, the

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[1] The Board also noted that (T1, p. 6):

"* * * [I]t is established beyond any reasonable doubt that respondent himself applied for the passport giving his true description, attaching his photo to it; and stating that he was going abroad. Under such circumstances, in the absence of evidence to the contrary, proof that the passport was used abroad raises a presumption that it was used by the person who applied for it and who is described by it."

court *en banc* sustained the deportation order for the reasons stated in Judge Friendly's prior dissenting opinion. Pet. App. 24–25; 350 F. 2d at 901.

ARGUMENT

The decision below correctly holds that the standard of proof applicable to deportation orders is that established by Section 242(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. 1252(b). By that provision, Congress directed the Attorney General to make regulations requiring that "no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." Previously, a lower quantum of proof—*i.e.*, "some evidence"—had been held sufficient. See *United States ex rel. Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 106; see generally, Gordon & Rosenfield, *Immigration Law and Procedure* § 8.12c (1965). Both houses of Congress specifically explained what was meant by "reasonable, substantial, and probative evidence" (S. Rep. No. 1137, 82d Cong., 2d Sess., p. 30; H. Rep. No. 1365, 82d Cong., 2d Sess., p. 57):

> The requirement that the decision of the special inquiry officer shall be based on reasonable, substantial, and probative evidence means that, where the decision rests upon evidence of such a nature that it cannot be said that a reasonable person might not have reached the conclusion which was reached, the case may not be reversed because the judgment of the appellate body differs from that below.

In 1961, when Congress established the present system of review of deportation orders in the courts of appeals, it specifically reaffirmed the substantial evidence standard as applicable to the new review procedures (Section 106(a)(4) of the Act, 8 U.S.C. 1105a(a)(4)):

> [T]he petition shall be determined solely upon the administrative record upon which the deportation order is based and the Attorney General's findings of fact, if supported by reasonable, substantial, and probative evidence on the record considered as a whole, shall be conclusive.

In the light of this history, petitioner's contention that these statutory provisions do not define the standard of proof (Pet. 8) is without merit. The government has the burden to establish deportability by "evidence that has relevant probative force and which a reasonable mind might accept as adequate to support a conclusion." *Lattig* v. *Pilliod*, 289 F. 2d 478, 479 (C.A. 7). The Special Inquiry Officer properly placed this burden on the government in the instant case (T3, p. 2),[4] and the facts set forth in the Statement, *supra*, show that the government

[4] Since petitioner refused to identify his original 1920 record of entry (Tr. 7-8), the government was in a position to rely on Section 291 of the Immigration and Nationality Act (8 U.S.C. 1361) which creates a presumption that an alien is in the United States contrary to law unless he proves the time, place and manner of entry. While the present administrative record does not contain proof of petitioner's lawful entry in 1920, we concede that such lawful entry was made. Therefore, the burden of proving entry without inspection in 1938 was properly on the government.

made out a strong and persuasive case (see T3, p. 6). There is no sound basis, in the light of the statute and its history, for petitioner's suggestion that the standard should be either "clear, unequivocal and convincing" proof or proof "beyond a reasonable doubt" (Pet. 7). The dissenters in the court below proposed what they recognized as largely a semantic change from the statutory standard in order to cause the Board "to proceed carefully" in cases such as this (Pet. App. 21). But there is no reason to believe that the Board did not proceed carefully here or that the statutory standard is not sufficient to insure careful consideration at the initial proceedings as well as on appellate review.[6]

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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APRIL 1966.

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[6] It should be noted that Congress has provided relief from deportation for resident aliens who meet certain conditions. Sections 244 and 249 of the Immigration and Nationality Act, 8 U.S.C. 1254, 1259. Petitioner has not applied for such relief.

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